Supreme Court, U.S.
FILED.
OCT 16 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 339

HERMAN R. SLAKMAN,

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

EARL FAIRCLOTH
ATTORNEY GENERAL

GEORGE R. GEORGIEFF
ASSISTANT ATTORNEY GENERAL

MICHAEL J. MINERVA
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT.

TOPICAL INDEX TO BRIEF

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	7
CONCLUSION	12
PROOF OF SERVICE	14

TABLE OF CITATIONS

CASES

	Page
Alcorta v. Texas, 355 U.S. 28 (1957)	10
Clemons v. U. S. 408 F. 2d 1230 (DC Cir. 1968); cert denied 394 U. S. 964	10
Gilbert v. California, 388 U. S. 263 (1967)	7,12
Miller v. Pate, 386 U. S. 1 (1967)	10
Mooney v. Holohan, 295 U.S. 103 (1935)	10
Simmons v. U. S., 390 U.S. 377 (1968)	7,8, 9,12
Slakman v. State, 222 So. 2d 221 (1969)	6
Stovall v. Denno, 388 U.S. 293 (1967)	7,12
United States v. Wade, 388 U. S. 218 (1967)	7,12

OTHER AUTHORITIES

Florida Rules of Criminal Procedure, Rule 1.220(f)	10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 339

HERMAN R. SLAKMAN,

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The State of Florida, Respondent, files this response as directed by this Court and moves that the writ of certiorari be denied.

QUESTION PRESENTED

The Respondent disagrees with the question presented by the Petitioner because said question assumes as fact that the identification witness gave an initial description "in a way not

resembling petitioner" and also assumes as fact that the photograph was displayed to the witness by investigators connected with the State for the purpose of preparing the witness for a courtroom identification. The foregoing assumptions of fact are not adequately supported by the record and the balance of the question leaves no possibility for argument to the contrary. Respondent suggests that the question presented is:

WHETHER, UNDER THE TOTALITY OF CIRCUMSTANCES, THE RECORD REVEALS A PRETRIAL IDENTIFICATION PROCEDURE WHICH WAS SO IMPERMISSIBLY SUGGESTIVE AS TO GIVE RISE TO A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.

STATEMENT OF THE CASE*

Lawrence Posey testified on behalf of the State and identified the Petitioner in court as the man who had admitted him, along with Hernandez, to the H & S Department Store in Lakeland, Florida. (Tr 28-30) Posey said he and Hernandez arrived there between 5:30 and 6 in the evening,

---

*Respondent will refer to the abbreviated record filed by the Petitioner using the symbol Tr.

walked to the front door of the store building, knocked, and "a man came to the door and let us in." (Tr 30) Inside, the men went to the back of the store and a conversation ensued between Hernandez and Slakman. Slakman was afraid of something going wrong and kept asking if everything was going to be alright; Hernandez reassured Slakman that "we would take care of everything;" Slakman gave Hernandez a roll of money and a key and then left by the front door. (Tr 30, 31) Posey testified further that he was in the presence of Slakman for a period of 5 or 10 minutes; that although the light conditions in the store were "sort of dark," he could "see him pretty plain." (Tr 32). Sometime shortly after 9 o'clock, Posey and Hernandez doused the inside of the store with gasoline, rigged an ignition device, and left by the front door. (Tr 33-34) Posey walked around to the back door, ran the string from the ignition device up the alley which was located behind the store, and pulled the string. (Tr 35) A muffled explosion was heard; Posey and Hernandez walked to a waiting car driven by Bedami and departed (Tr 35, 36). The store was consumed by the explosive fire.

Corroborating this testimony was that of Clark Stone, a private investigator. On the night of the fire, Stone happened to be conducting a surveilance, and was sitting in his car outside the store from approximately 5:55 p.m. until 9:05 p.m., with the exception of 15 minutes between 6:45 and 7 p.m. Stone testified that he

knew the Petitioner Slakman and saw him come out the front door of his store some time after 6:30 p.m. (Tr 47-49)

On cross examination, Stone admitted that he could not positively say he could see the front door of the store, as the doors were recessed and from his position on the corner the front door was not visible. (Tr 52)

Stone testified at the hearing on Petitioner's motion for new trial as follows: (Tr 78)

"Q. So actually, you are not changing your testimony, are you, Mr. Stone? You still believe that it was Mr. Slakman but you are just saying you could be mistaken?

"A. I am saying I could be mistaken, yes, sir."

Attempting to save the situation, Petitioner's counsel asked on redirect:

"Q. Are you now willing to testify on oath, as you testified in this trial-- did you see Mr. Slakman on this particular evening, Mr. Stone" Answer: Yes, sir, yes, I did. Where did you see him? I saw him come out the front door of the store.

"A. I couldn't in good conscience make that statement, no." (Tr 78,79)

This question and answer is ambiguous and can easily be interpreted as a statement by Stone that the only thing that he could not in good conscience testify to was that he had seen the Petitioner "come out the front door of the store." This was consistent with his original testimony that he could not see the recessed front doors.

Furthermore, the sworn statement given by Stone to Petitioner's counsel after the trial contains the following:

"A. I saw a man--I saw a man in front of the H & S whom I just thought come out of the store and I couldn't be positive about that because, as you pointed out, the doors were recessed, and the man was slight built and I just had a few seconds glance at him. I don't know which way he turned on the sidewalk or where he went. I just thought in my mind it was Slakman.

"Q. Because of the fact he appeared to have come out of the store?

"A. That's right. That's correct." (Tr 67)

Although Petitioner was particularly anxious to elicit this explanation from Stone after the trial, almost identical testimony was blocked by the Petitioner's counsel during the trial. (Tr 49)

> "A. I saw him come out the front door of his department store. He was on the sidewalk, and I just thought in my mind--
>
> Mr. Smith: Excuse me. I object to what he thought in his mind--being incompetent, irrelevant, and immaterial."

Stone's testimony after the trial was therefore not significantly different from that which was, or could have been, brought out at trial. The net effect of the "retraction" was merely an admission by Stone that he could have been mistaken.

Posey's recantation alluded to by Petitioner was held "not properly in the record on appeal now before us" by the Second District Court of Appeal, Slakman v. State, 222 So. 2d 221. The Court also said that:

> "Nothing herein shall preclude the Appellant from filing such petition as he may determine appropriate in the trial court." Ibid.

Reference to that "recantation" is improper here for any purpose as it has never been considered by a state court.

ARGUMENT

Petitioner has failed to make a showing that his conviction resulted from the violation of any right guaranteed by the United States Constitution. United States v. Wade, 388 U. S. 218 (1967), and Gilbert v. California, 388 U. S. 263 (1967), relied on by Petitioner, are distinguishable from the case here involving photographs, just as this Court distinguished those decisions in Simmons v. United States, 390 U. S. 377 (1968), saying:

> "[T]his court first departed from the rule that the manner of an extra-judicial identification affects only the weight, not the admissability, of identification testimony at trial. The rationale of those cases was that an accused is entitled to counsel at any "critical stage of the prosecution," and that a post-indictment lineup is such a "critical stage." (Emphasis added) 390 U.S. at 382, 383.

The test to be applied here is whether, under the "totality of circumstances," the identification procedure revealed by the record constituted a violation of due process of law. Stovall v. Denno, 388 U. S. 293 (1967); compare U. S. v. Wade, supra and Gilbert v. California, supra, with Simmons v.United

States, supra. Specifically, as to photographs, this Court, in Simmons, held that:

> "Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eye-witnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement." (Emphasis added) 390 U.S. at 384.

While the burden is on the State to demonstrate that the defendant is represented by counsel at pretrial lineups, the burden of showing error because of an identification procedure involving photographs under the totality of circumstances is on the defendant. Simmons v. United States, supra. Simmons makes clear that dangers of photo-induced misidentification can be minimized by cross examination. Unlike lineups, photographic displays are capable of reconstruction

at trial and, therefore, the safeguard of cross examination is sufficient to expose flaws in the procedure.

The testimony at trial shows only that Posey said he was shown "a couple of pictures" and that Savage laid them down and asked him "which one was it and which one was Mr. Slakman." (Tr 46) This display took place at least three or four months prior to trial.

Petitioner's claim that the photographic display was suggestive is not supported by the record. In Simmons, this Court placed reliance on defense counsel to bring out any unfairness or unreliability in photographic identification. With this record so threadbare, Petitioner is apparently urging that any uncertainties as to the totality of circumstances are to be resolved against the State. Indirectly, this puts upon the prosecution the responsibility of cross examining its own witness, if, as here, the defense fails to do so.

Petitioner did not ask Posey or any other witness how many pictures were displayed, did not ask about the appearance of the other persons pictured, did not ask whether Posey had difficulty in making the identification and did not ask whether Savage indicated by word or action which picture was that of Slakman.

Moreover, Petitioner asserts conjecturely that Savage was an agent of the State when in fact Savage was employed

as an investigator for an insurance company. (Tr 14, 20-22) There is no testimony indicating that the prosecutor had any knowledge of this photographic identification. Accordingly, whatever Savage may have done on his own as an insurance investigator is not attributable to the State. Cf. Miller v. Pate, 386 U.S. 1 (1967); Alcorta v. Texas, 355 U.S. 28 (1957); Mooney v. Holohan, 295 U.S. 103 (1935).

Parenthetically, Respondent notes that the Petitioner could have utilized discovery by taking Posey's deposition prior to trial and determined whether any improper identification procedures had been used. See Florida Rules of Criminal Procedure 1.220(f). Or, if surprised at trial, Petitioner could have tried to elicit the facts out of the presence of the jury. See e.g. Clemmons v. United States, 408 F. 2d 1230 (DC Cir. 1968) cert denied 394 U.S. 964. Neither of these alternatives was attempted, and accordingly there is silence in the record. Petitioner should not be able to benefit from this silence since it was his responsibility to demonstrate the unfairness.

In short, the record does not show a suggestive photographic display. The record shows a suggestion about a display.

Petitioner claims that Posey's description of Slakman, as given to Savage, varied widely from Slakman's actual appearance. Many of the characteristics

are imprecise; "pretty fair complexioned" versus "sallow;" about "40 years of age" versus about "50 to 55;" eyebrows not "too dark" or "too heavy" versus "pretty dark." Other discrepancies are founded upon the testimony of Petitioner's own wife (hardly a neutral witness) that he could not see without glasses, and that he never wears brown. (Tr 56) The descriptions "kind of full in the face," and "not slim" are references to a statement read by Petitioner's counsel on cross examination of Posey, never introduced into evidence. These discrepancies are the natural, minor inaccuracies present in many descriptions. But Petitioner fails to mention that Posey also told Savage that the "owner" was a "short, thin ... small guy." (Tr 16) Significantly, Stone also described the man he saw and identified as Slakman as being "slightly built." (Tr 67). Thus Posey's description of Slakman was not as faulty as Petitioner contends.

The real question in this case is credibility of witnesses ; not constitutional error grounded upon pretrial identification

The record contains sufficient evidence for this Court to conclude that even if the identification procedure was suggestive, the in-court identification can stand because it had an independent origin. See United States v. Wade, supra. This independent origin is shown by Posey's testimony that he saw Slakman

in the store for 5 or 10 minutes on the night of the crime. This testimony is made believable because Stone corroborated the fact that Slakman came out of the store at approximately the time Posey said he did. Stone's identification is reliable because he knew Slakman and, therefore, his identification was not that of a stranger. Moreover, it must be assumed that Posey had identified Slakman from the pictures. There is no indication that he ever failed to identify Slakman or that he ever identified some other person. It must also be presumed that one purpose for showing Posey the pictures was to exonerate Slakman if Posey were unable to recognize him from the photographs. Cf. Stovall v. Denno, supra.

The only doubt cast upon the identification testimony of Posey and Stone comes from the purported retractions of those witnesses after the trial. Respondent submits that if any portion of this record is subject to doubt, it is those eleventh hour recantations.

CONCLUSION

Respondent urges that certiorari be denied because no constitutional issue is presented. Wade and Gilbert do not apply to this case. Stovall and Simmons have already established the principle that pretrial identification must be fair under the totality of circumstances.

This case could establish nothing further in the way of constitutional principles. And most importantly, the record does not show a commission of constitutional violation.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

MICHAEL J. MINERVA
Assistant Attorney General

Counsel for Respondent

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301

PROOF OF SERVICE

This is to certify that I have served a copy of the foregoing Response to Petition for Writ of Certiorari, by mail, to Honorable Chester Bedell and Honorable Robert P. Smith, Jr., Counsel for Petitioner, 1520 Barnett Bank Building, Jacksonville, Florida 32202, this _____ day of October, 1970.

GEORGE R. GEORGIEFF
Assistant Attorney General